

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of:

Rules and Policies on Foreign Participation
in the U.S. Telecommunications Market

IB Docket No. 97-142

**AERONAUTICAL RADIO, INC.,
PETITION FOR PARTIAL RECONSIDERATION**

I. INTRODUCTION

Aeronautical Radio, Inc. ("ARINC") respectfully requests the Federal Communications Commission ("Commission" or "FCC") to reconsider one aspect of the *Foreign Participation Order*, namely that the Aeronautical Enroute Service is a "basic telecommunications service that falls within the class of services covered by the WTO Basic Telecom Agreement."¹ Although, ARINC supports the Commission's decision to open the U.S. market for basic telecommunications services, ARINC believes that the Aeronautical Enroute Service is not "basic." On the contrary, the Aeronautical Enroute Service provides private, enhanced, air-to-ground safety communications between an aircraft operating agency's ground-based facilities and its flight crew on board an aircraft. Thus, the Aeronautical Enroute Service is not subject to the United States' WTO Basic Telecom Agreement commitments.

¹ *Foreign Participation in the U.S. Telecommunications Market*, IB Docket No. 97-142, Report and Order and Order on Reconsideration, FCC 97-389, ¶ 117 (Nov. 26, 1997) ("*Foreign Participation Order*").

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Indeed, due to the importance of these non-commercial facilities to the United States' national security and to the safety of the flying public, the Aeronautical Enroute Service qualifies for exemption from the General Agreement on Trade in Services ("GATS"). The Commission should more appropriately treat the Aeronautical Enroute Service outside the realm of regulation by the World Trade Organization ("WTO").

ARINC provides non-discriminatory, transparent access to the aeronautical enroute frequencies to foreign airlines at hundreds of locations in the United States, and these assignments are made available on the same basis as they are to domestic aircraft operators. This practice will ensure the continued availability of aeronautical enroute spectrum to all aircraft operators, foreign and domestic alike, in the future. Ironically, were the Commission to treat the Aeronautical Enroute Service as a commercial service, this equitable access to such facilities might be denied to smaller, less affluent, domestic and foreign aircraft operators and to new entrants. Under those circumstances, the public interest in maintaining competition among air carriers and reducing barriers to entry into the air transport industry would be threatened. For these reasons, ARINC requests that the Commission not subject the Aeronautical Enroute Service to the United States' WTO Basic Telecom Agreement commitments. Continued equitable access to important aeronautical safety resources, under air transport industry guidelines, will then be assured.

II. THE COMMISSION SHOULD NOT INCLUDE THE AERONAUTICAL ENROUTE SERVICE IN THE WTO BASIC TELECOM AGREEMENT BECAUSE THE SERVICE IS USED TO PROTECT U.S. NATIONAL SECURITY, HUMAN LIFE AND SAFETY AND IS MORE APPROPRIATELY EXCLUDED FROM THE GATS

The Commission should not include the Aeronautical Enroute Service in the WTO Basic Telecom Agreement because such safety service is more appropriately excluded from WTO regulation. Article XIV(b) of the GATS provides that:

nothing in this agreement shall be construed to prevent the adoption or enforcement by any Member of measures...*necessary to protect human...life or health*; [or] to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:...*safety*...²

Similarly, Article XIV *bis* permits a WTO Member to exclude from GATS obligations those services “necessary for the protection of its *security interests*.”³ Due to the role aeronautical enroute communications serve in safeguarding U.S. national security and ensuring aviation safety, an exemption from GATS principles under these provisions is warranted. Thus, the Commission erred by adding the Aeronautical Enroute Service to its WTO Basic Telecom Agreement market opening commitments. Accordingly, ARINC requests that the FCC reconsider its decision.

A. The Aeronautical Enroute Spectrum Is Used To Ensure Flight Safety

Typical aeronautical enroute messages can include emergency and routine communications concerning changes in route or destination, aircraft performance, fuel, weather,

² General Agreement on Trade in Services, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 33 I.L.M. 1167, Art. XIV §§ (b) & (c)(iii) (1994) (“*GATS*”) (emphasis added).

³ *GATS*, Art. XIV *bis* § 1(b) (emphasis added).

turbulence, position reports, and essential services and supplies. The role of these operational control communications in ensuring flight safety, and the large number of airlines and aircraft operators requiring efficient access to such services in the United States, is optimized by oversight of the spectrum by a single experienced U.S. entity.⁴ Diversifying management of the scarce spectrum available for aeronautical enroute communications would disrupt this system that has successfully operated for many years.

B. Aeronautical Enroute Service Is Used To Protect U.S. National Security

The United States has an interest in supervising aircraft operations and communications in the United States airspace. United States aviation accounts for 40% of the total world commercial aviation activity and a majority of military operations. The Aeronautical Enroute Service provides the facilities for the operational control of much of the civil aircraft movement, both foreign and domestic, in the United States airspace. The Aeronautical Enroute Service is also used for some communication with military aircraft and with U.S. air carrier participants in the civil reserve air force (CRAF).

ARINC, the communications company of the air transport industry, manages the aeronautical enroute spectrum throughout North America in accordance with the regulations of the FCC, the International Telecommunication Union ("ITU"), and the International Civil Aviation Organization ("ICAO") pursuant to guidelines drafted by the Aeronautical Frequency

⁴ Pursuant to the Commission's "one licensee per location" rule (47 C.F.R. § 87.261(c)), ARINC has served as an efficient and effective manager of aeronautical enroute spectrum for almost seven decades. The Commission has from time to time reviewed this rule, and ARINC's stewardship of the spectrum thereunder, and found it to serve the public interest. *Petition for Rulemaking to Amend Part 87*, Memorandum Opinion and Order, RM-3113 (Jan. 24, 1980) ("Swift Aire").

Committee (“AFC”).⁵ As such, ARINC provides the U.S. government with U.S. control over these facilities. Thus, the aeronautical enroute facilities are available during national emergencies, terrorist attacks, military maneuvers, airplane malfunctions, and crash investigations.

Indeed, just a few years ago, the Commission acknowledged that “[a]eronautical services play a critical role in aviation safety in the United States, and their proper use in supporting air navigation is *vital to national security*.”⁶ If the Commission persists in subjecting the Aeronautical Enroute Service to commercial market principles applicable to basic telecommunications services, control over and access to these critical services could be compromised and the United States’ ability to protect its national security interests jeopardized. Moreover, the United States is not alone in demanding a single operation of aeronautical enroute data communications. Similar limitations exist in a number of other countries, including Japan and Brazil.

In light of these national security and safety implications, the FCC should reconsider its treatment of the Aeronautical Enroute Service in the *Foreign Participation Order*. By appending the Aeronautical Enroute Service to the WTO Basic Telecom Agreement, the Commission failed to consider the applicability of the exclusions from GATS principles embodied in Articles XIV and XIV *bis*. Thus, to maintain U.S. supervision over a significant tool for protecting national

⁵ The Aeronautical Frequency Committee consists of representatives from the civil aviation community, including representatives from general and business aviation. The International Air Transport Association is an associate member of this committee.

⁶ *Market Entry and Regulation of Foreign-Affiliated Entities*, 11 F.C.C. Rcd 3873, 3948 (1995) (“*Foreign Carrier Entry Order*”) (emphasis added).

security and ensuring flight safety, the Commission should not treat the Aeronautical Enroute Service as a basic telecommunications service.

III. THE AERONAUTICAL ENROUTE SERVICE IS NOT A “BASIC” TELECOMMUNICATIONS SERVICE AND, THUS, SHOULD NOT BE SUBJECT TO THE WTO BASIC TELECOM AGREEMENT

The Aeronautical Enroute Service is not a basic telecommunications service. On the contrary, it is a private, enhanced air-to-ground communications datalink that ensures the safety of flight. In the instant rulemaking, the FCC passed over the private nature of the Aeronautical Enroute Service and did not even consider that the datalink application under discussion is clearly of an enhanced service. Accordingly, the Commission should reconsider its decision to apply the WTO Basic Telecom Agreement’s market opening principles to the provision of the Aeronautical Enroute Service in the United States.

A. The Aeronautical Enroute Service Is Not “Public”

The Aeronautical Enroute Service is a private, non-commercial radio communications datalink used by aircraft operators to maintain regularity of air flight. It is not offered to the public generally⁷ and thus, consistent with the WTO’s use of the term, is not a “basic” telecommunications services.⁸ The Commission misconstrues the importance of the distinction between public and private services when it states that “the WTO Basic Telecom Agreement encompasses both private and commercial telecommunications services.”⁹ Private services are a

⁷ The Commission’s rules prohibit public correspondence by aeronautical enroute stations. 47 C.F.R. § 87.261(a).

⁸ See ARINC Reply Comments at 3-7 (Aug. 12, 1997).

⁹ *Foreign Participation Order*, ¶ 117.

class of services excluded from the GATS Annex on Telecommunications.¹⁰ Indeed, throughout the WTO Global Basic Telecom Negotiations, inclusion of the Aeronautical Enroute Service was not contemplated.

Moreover, the fact that the Aeronautical Enroute Service may be used as part of a non-public mobile network is insufficient to support its classification as part of the WTO Basic Telecom Agreement. In light of the “private” nature of the Aeronautical Enroute Service, the Commission cannot rationally support its inclusion in United States’ WTO Basic Telecom Agreement commitments.

B. The Aeronautical Enroute Service Is “Enhanced”

The Aeronautical Enroute Datalink Service is an “enhanced” service, not “basic.”

Section 64.702(a) of the Commission’s rules defines enhanced services as services:

which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber’s transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information.¹¹

Similarly, the GATS Telecommunications Annex observes that services involving “any end-to-end change in the form or content of the customer’s information” are outside the scope of “public telecommunications transport service.”¹²

¹⁰ See GATS, Annex on Telecommunications §§ 2 & 3 (clarifying that only “public” telecommunications transport networks and services are subject to the GATS).

¹¹ 47 C.F.R. § 64.702(a).

¹² GATS, Annex on Telecommunications § 3(b).

Aeronautical enroute data services, such as ARINC's ACARS and SITA's AIRCOM, involve code, speed, protocol and format conversions for all data transmitted between an aircraft and its ground-based facilities. Sophisticated frequency management and message accountability features are also employed to ensure air safety and service efficiency. Thus, by any definition, aeronautical enroute services are "enhanced" and not subject to inclusion in the Commission's rulemaking to implement U.S. obligations arising out of the WTO Basic Telecom Agreement.

IV. CONCLUSION

For the foregoing reasons, the Commission should reconsider its conclusion that the Aeronautical Enroute Service is a "basic" telecommunications service subject to the market opening commitments of the WTO Basic Telecom Agreement.

Respectfully submitted,

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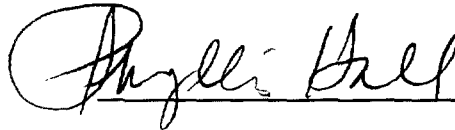
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Certificate of Service

The undersigned hereby certifies that the preceding document was delivered by United States first class mail (except as otherwise indicated), postage prepaid, to the persons listed below.

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